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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

PETITIONER'S REPLY BRIEF.

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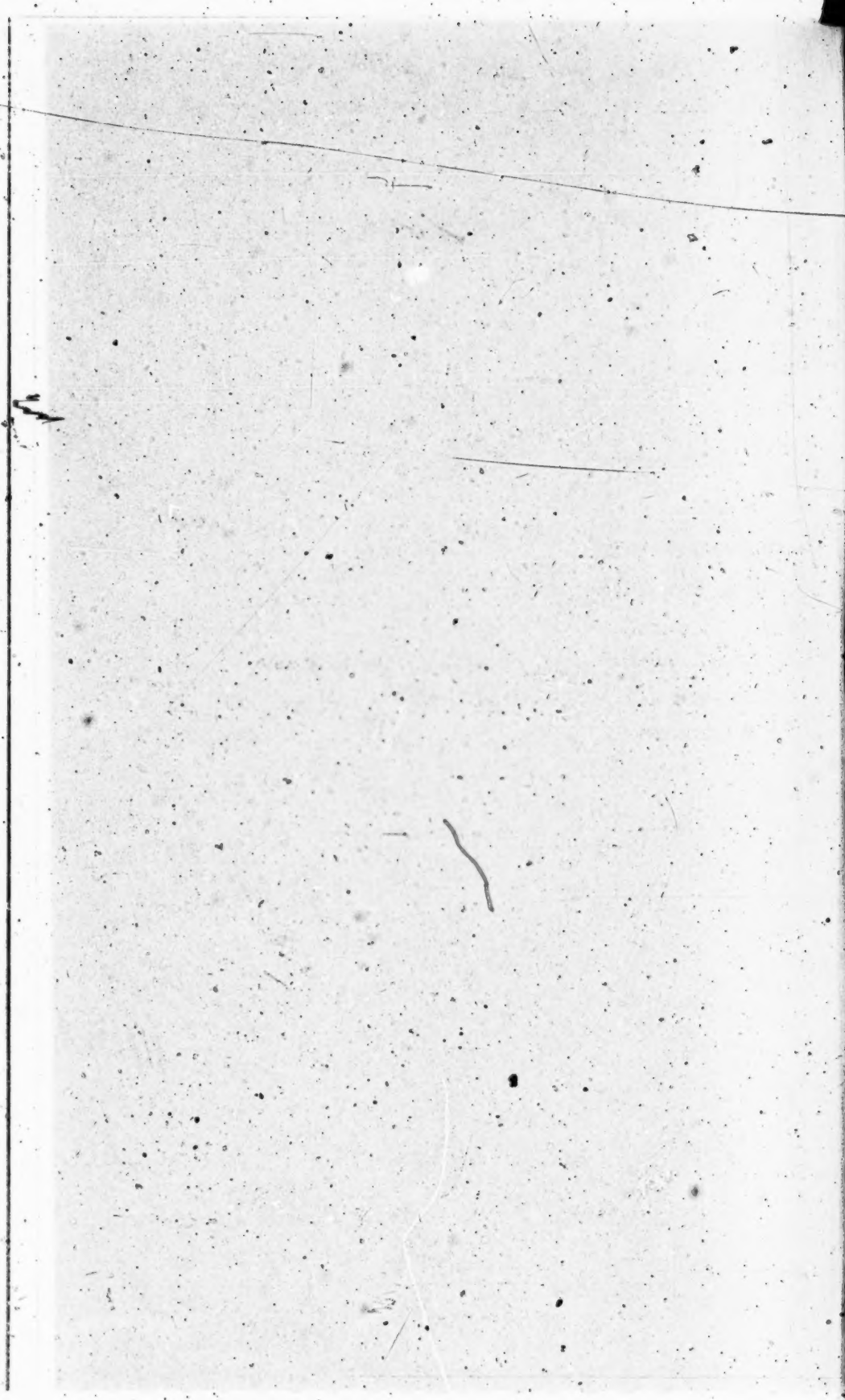

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CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

PETITIONER'S REPLY BRIEF.

May it please the Court:

Though respondents' brief raises no substantial issue which has not been dealt with in our main brief, it does afford further insight into the curious conception of criminal justice which is entertained by the City of Louisville and is administered through its Police Court. The respondents have succeeded in dispelling any doubt that the state of affairs reflected by the present record results from a deliberate official policy, systematically applied, rather than from an unfortunate aberration.

The substance of this policy is avowed with remarkable frankness. Respondents say that in loitering cases guilt or innocence cannot be determined by "the

same tangible modes of proof that disclose most offenses", since "they arise more from a course of conduct or a manner of life than from an isolated act" (Brief, p. 21). Or, to say the same thing more bluntly, the question is not what petitioner has *done* but what kind of man the police think he *is*. This is said to be a salutary approach because, respondents declare, "Many major crimes have been nipped in the bud by such vigilance". (*Ibid.*)

Nor, apparently, do respondents even consider it necessary to adduce evidence on these shadowy issues. The present record contains no proof of petitioner's "course of conduct" or "manner of life," and indeed rebuts the implication that his arrest may have forestalled a "major crime"; he had no felony record (R. 37-38). Beyond this, there is no showing that either of the arresting officers knew anything about the petitioner's "manner of life"; officer Barnett (who did not testify) was only proved to have known of the bus station incident which took place ten days before (R. 26), and officer Lacefield testified that he did not even know about that (R. 11). But respondents nevertheless claim that the arrests and convictions were lawful.

The plain purport of respondents' argument is that crime can effectively be suppressed by the erection of a conclusive presumption to the effect that anyone who is arrested for loitering must be guilty. (Why else would he have been arrested?) And if injustice is the by-product of this great public service, respondents say (with the full concurrence of Kentucky's highest

court) that "in the case of a petty offense with a small punishment, the injustice is not great" (Brief. p. 18). In Point III of our main brief, we have said why we cannot agree that justice is measurable in dollars.

The cold determination with which the City pursues its said policy is shown by its readiness to indulge in fanciful departures from the record and to embrace weirdly novel interpretations of ordinances and statutes. We simply note here the more extreme instances, foregoing extended discussion:

1. *Misstatements of the evidence.* The following factual assertions, which are contrary to the undisputed evidence, appear in respondents' brief:

(a) That petitioner had had nothing to eat or drink at Liberty End Cafe (Resp. Brief, pp. 9, 12). The evidence on this point is not in conflict. It is fully and fairly reviewed in our main brief (pp. 17, 21). There is no reason why, having finished his macaroni and beer, he could not stay in the cafe to wait for his bus, as he told officer Lacefield he was doing.

(b) That petitioner "could not—or would not—even say whether a man or a woman made the sale" (Resp. Brief, p. 9). He was not asked this question.

(c) That petitioner "confided at the trial that he didn't know what time the bus was due" (Resp. Brief, p. 10). He did not do so. The truncated excerpt from the testimony which respondents quote in their supporting footnote is immediately

followed by petitioner's explanation (not quoted) that though he had no watch he could tell the time from the cafe clock (R. 23-24).

(d) That petitioner was questioned at "around 6:40" (Resp. Brief, p. 10). The record does not show when the questioning took place. Officer Lacefield testified that he made the arrest at 6:53 P.M. (R. 1). Only the briefest questioning preceded the arrest (R. 2).

(e) That the police "informed he petitioner of their intention to arrest him and the nature of the charge" (Resp. Brief, p. 15). The undisputed evidence is that they arrested him first and informed him later (R. 2, 24).

(f) That petitioner at the time of his arrest was "unruly" (Resp. Brief, p. 4). The undisputed evidence is to the contrary (R. 24-25; *cf.* R. 3).

2. ***Factual assertions unsupported by the evidence.*** On the specious ground that petitioner's alleged prior drunkenness convictions are pertinent to the present loitering charge, respondents have printed as Appendix B to their brief what purports to be an unauthenticated list of a number of misdemeanor arrests including but not limited to drunkenness. The list is apparently compiled from police department records, which are not public records and were not received in evidence. They were offered at the January 20 trial but were excluded when cross-examination disclosed confusion

between two separate Sam Thompsons. They were not offered in evidence at the February 3 trial.*

Respondents also imply that petitioner is a person of "ill repute" (Brief, p. 11). The record does not so indicate.

3. *Grotesque statutory construction.* The facts, even as remade by respondents, do not support their legal position unless they can win this Court's acquiescence in the following bizarre contentions—none of which, so far as we can ascertain, has ever been approved by the Police Court of Louisville *or any other Kentucky court:*

> (a) That the prohibition against loitering "upon, along, in or through the public streets" includes loitering in privately owned premises adjacent to public streets (Brief, pp. 2, 3, 6, 7).

This would of course include every store and dwelling in town and would render superfluous the next clause (analyzed and discussed at pp. 14-18 of our main brief) which does apply to private premises. In a gallant effort to avoid this absurdity, respondents make from whole cloth the further contention that "along * * * the streets" includes only those private premises which are also "public places" within the meaning of the prohibition against drunkenness in a

*In view of respondents' eagerness to bring this material before the Court, it is perhaps appropriate to note that petitioner has been arrested twelve times since January 24, 1959, and is now in Jefferson County Jail by reason of his inability to make a $500 peace bond. The judgment requiring the peace bond is unappealable. KRS § 26.080(3).

public place. That is the only apparent pertinence of the *Ginger (sic. Ginter)* citation.

(b) That "visible means of support" is affluence so apparent that police officers can detect its absence even if, like the arresting officers here, they ask no questions about it (Brief, p. 12).

The requirement might be satisfied by the wearing of a sandwich sign carrying a current personal balance sheet and operating statement, duly certified. It is hard to see how anything less would serve.

The prosecutor will perhaps be astonished at respondents' assertion (Brief, p. 13) that he emphasized at the trial the distinction between the loitering ordinance (which uses the word "visible") and the vagrancy statute (which does not). What he *said* was: "There is no charge of no visible means of support" (R. 16).

(c) That the requirement of a "satisfactory account" is not satisfied even by a complete, truthful and polite response to a police interrogation unwarranted by law, if the policeman (not knowing that suburban buses run on schedules and relying on what he understood Mr. Marks to have told him) "reasonably" doubts its veracity (Brief, pp. 13-14).

This point is discussed at pp. 15-17 of our main brief.

(d) That it is a crime to "dance" (here, to shuffle one's feet to the music of a juke-box) in any tavern or other place licensed to sell beer at a bar, except a hotel (Brief, pp. 3, 13).

The ordinances cited for this view (Resp. Brief, Appendix B, pp. 23-25) prescribe limitations on the grant of alcoholic beverage licenses and dance hall licenses but do not purport to regulate or penalize dancing as such. City licenses to dispense alcoholic beverages are not to be granted to any applicant (other than a hotel) who invites or permits dancing in a room where the bar is located (§ 61-46). Separate dance hall licenses are to be issued only if the City Director of Safety approves (§ 67-16). The Director of Safety is not empowered, however, to grant dispensations from § 61-46. Officer Ellis and his superiors may be interested to learn this, since his testimony indicates that the police have been approving dance hall licenses for some beer licensees (R. 13). Judge Taustine may also be interested to know that his gratuitous inquiry as to the existence of a "license for dancing" (R. 9) was wholly foreign to the issues, since the Liberty End Cafe has but one room for its customers and could therefore not operate as a dance hall without losing its beer license.

It is pretty far-fetched to say that petitioner's little "dance" converted the cafe into a dance hall or jeopardized its beer license. But it is downright ridiculous to suggest that his foot-shuffling rendered him a criminal or a trespasser (Resp. Brief, pp. 11, 13). The

cited city alcoholic beverage ordinance, like KRS § 244.080 (referred to below) prescribes requirements for licensees and not for their customers.

(e) That KRS § 244.080, which forbids licensees to sell alcoholic beverages to certain classes of people, made it illegal for petitioner to buy a glass of beer.

There are two answers to this. First, the record contains no evidence that petitioner came within any of the specified classes—minors, intoxicated persons, habitual drunkards, persons convicted of drunkenness three times in the past year, etc.; nor is there any evidence that he was a person of ill repute, or disorderly (see KRS § 244.120).

Second, Attorney General Jo M. Ferguson, of counsel for the respondents, has officially ruled (Op. Atty. Gen. No. 38,568, June 14, 1956), that "only the licensee may be charged with and convicted of a violation of said statute [KRS § 244.080]", so that even a bartender employed by the licensee cannot be prosecuted under it—much less a customer. Nor was petitioner charged with such a violation.

(f) That the privileges of the police to inspect premises licensed for the dispensing of alcoholic beverages includes the right to interrogate the customers of such licensees and require them to give a "satisfactory account" of themselves (Resp. Brief, p. 13).

The ordinance (§ 61-25) does not say so.

> (g) That a landlord's general invitation to the public, which is of course sufficient to bar an action for civil trespass, is not sufficiently "express" to satisfy the loitering ordinance (Resp. Brief, p. 11).

This has the anomalous effect of giving criminal trespass a broader scope than civil trespass.

Respondents are of course mistaken in saying that the Police Court has adopted any of the foregoing positions as to the meaning of the ordinances and statutes. All Judge Taustine said was: "Let the judgment be a $10 fine on each charge" (R. 31).

4. *Misstatement of the issues.* Respondents devote a good deal of their brief to issues which we have not raised, such as the questions whether plenary appellate review is a due process requirement (Brief, pp. 2, 16-18) and whether reprisal can be inferred from the sole fact of repeated convictions (*Id.*, pp. 3, 20-21).

Respondents also seek to make it appear that petitioner might have obtained relief in the Kentucky Court of Appeals because of his "financial inability to pay" the two $10 fines (Brief, p. 20). It is true that petitioner is not a rich man. His resources might well have been insufficient to defray the expenses of this appellate proceeding, and it is for that reason that Kentucky Civil Liberties Union (the Kentucky affiliate of American Civil Liberties Union) has assumed the burden of that expense in consideration of the im-

portant issues involved—for which generosity petitioner and his counsel are duly grateful. But petitioner has never contended that he was financially unable to pay the two $10 fines; and in our petition for certiorari (footnote, p. 36) we explicitly pointed out that the Court of Appeals had been mistaken in assuming otherwise.

Moreover, the very fact that the Court of Appeals withheld relief on the merits in spite of its erroneous assumption that petitioner was financially unable to pay the fines, shows that respondents are mistaken in asserting that this circumstance might have carried weight. The Court of Appeals had before it the entire record which is available to this Court—including the transcripts of evidence taken at the two trials. It demonstrated its readiness to grant relief under § 110 even though a different form of relief had been requested; but it nevertheless declared that petitioner's substantive Federal claims "cannot be tested" except on certiorari to this Court. Respondents' counsel, far from urging in the Court of Appeals that a State Court remedy was available, vigorously urged the opposite view (see Reply Brief in Support of Certiorari Petition, pp. 2-3). It is hardly consistent for them to contend now that review under § 110 was available.

Finally, the respondents' brief repeatedly argues that the *arrest* was legal even if the conviction was erroneous (pp. 5, 13, 15). This case brings up the convictions themselves for direct review, and the respondents' concern over the legality of the arrest as such simply emphasizes their determination to preserve the

immunity of police officers from civil liability for their official actions, however arbitrary those actions may be.

The year is now 1960. It is not 1600; nor, if we may be permitted to say so, is it 1984.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1959.

Sam Thompson, Petitioner, v. City of Louisville, et al. } On Writ of Certiorari to the Police Court of the City of Louisville, Kentucky.

[March 21, 1960.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was found guilty in the Police Court of Louisville, Kentucky, of two offenses—loitering and disorderly conduct. The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

The facts as shown by the record are short and simple. Petitioner, a long-time resident of the Louisville area, went into the Liberty End Cafe about 6:20 on a Saturday evening, January 24, 1959. In addition to selling food, the cafe was licensed to sell beer to the public and some 12 to 30 patrons were present during the time petitioner was there. When petitioner had been in the cafe about half an hour, two Louisville police officers came in on a "routine check." Upon seeing petitioner "out there on the floor dancing by himself," one of the officers, according to his testimony, went up to the manager who was sitting on a stool nearby and asked him how long petitioner had been in there and if he had bought anything. The officer testified that upon being told by the manager that petitioner had been there "a little over a half-hour and that he had not bought anything," he

accosted Thompson and "asked him what was his reason for being in there and he said he was waiting on a bus." The officer then informed petitioner that he was under arrest and took him outside. This was the arrest for loitering. After going outside, the officer testified, petitioner "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him." Admittedly the disorderly conduct conviction rests solely on this one sentence description of petitioner's conduct after he left the cafe.

The foregoing evidence includes all that the city offered against him, except a record purportedly showing a total of 54 previous arrests of petitioner. Before putting on his defense, petitioner moved for a dismissal of the charges against him on the ground that a judgment of conviction on this record would deprive him of property and liberty without due process of law under the Fourteenth Amendment in that (1) there was no evidence to support findings of guilt and (2) the two arrests and prosecutions were reprisals against him because petitioner had employed counsel and demanded a judicial hearing to defend himself against prior and allegedly baseless charges by the police.[2] This motion was denied.

Petitioner then put in evidence on his own behalf, none of which in any way strengthened the city's case. He testified that he bought, and one of the cafe employees

[1] Upon conviction and sentence under §§ 85-8, 85-12 and 85-1 of the ordinances of the City of Louisville, petitioner would be subject to imprisonment, fine or confinement in the workhouse upon default of payment of a fine.

[2] Petitioner added that the effect of convictions here would be to deny him redress for the prior alleged arbitrary and unlawful arrests. This was based on the fact that, under Kentucky law, conviction bars suits for malicious prosecution and even for false imprisonment. Thus, petitioner says, he is subject to arbitrary and continued arrests neither reviewable by regular appellate procedure nor subject to challenge in independent civil actions.

served him, a dish of macaroni and a glass of beer and that he remained in the cafe waiting for a bus to go home.[1] Further evidence showed without dispute that at the time of his arrest petitioner gave the officers his home address; that he had money with him, and a bus schedule showing that a bus to his home would stop within half a block of the cafe at about 7:30; that he owned two unimproved lots of land; that in addition to work he had done for others, he had regularly worked one day or more a week for the same family for 30 years; that he paid no rent in the home where he lived and that his meager income was sufficient to meet his needs. The cafe manager testified that petitioner had frequently patronized the cafe, and that he had never told petitioner that he was unwelcome there. The manager further testified that on this very occasion he saw petitioner "standing there in the middle of the floor and patting his foot," and that he did not at any time during petitioner's stay there object to anything he was doing. There is no evidence that anyone else in the cafe objected to petitioner's shuffling his feet in rhythm with the music of the juke box or that his conduct was boisterous or offensive to anyone present. At the close of his evidence, petitioner repeated his motion for dismissal of the charges on the ground that a conviction on the foregoing evidence would deprive him of liberty and property without due process under the Fourteenth Amendment. The court denied the motion, con-

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[1] The officer's previous testimony that petitioner had bought no food or drink is seriously undermined, if not contradicted, by the manager's testimony at trial where the manager stated that the officer "asked me *I had* [*sic*] sold him any thing to eat and I said no and he said any beer and I said no . . . ." (Emphasis supplied.) And the manager acknowledged that petitioner might have bought something and been served by a waiter or waitress without the manager noticing it. Whether there was a purchase or not, however, is of no significance to the issue here.

victed him of both offenses, and fined him $10 on each charge. A motion for new trial, on the same grounds, also was denied, which exhausted petitioner's remedies in the police court.

Since police court fines of less than $20 on a single charge are not appealable or otherwise reviewable in any other Kentucky court,[4] petitioner asked the police court to stay the judgments so that he might have an opportunity to apply for certiorari to this Court (before his case became moot)[5] to review the due process contentions he raised. The police court suspended judgment for 24 hours during which time petitioner sought a longer stay from the Kentucky Circuit Court. That court, after examining the police court's judgments and transcript, granted a stay concluding that "there appears to be merit" in the contention that "there is no evidence upon which conviction and sentence by the Police Court could be based" and that petitioner's "Federal Constitutional claims are substantial and not frivolous."[6] On appeal by the city, the Kentucky Court of Appeals held that the Circuit Court lacked the power to grant the stay it did but nevertheless went on to take the extraordinary step of granting its own stay, even though petitioner had made

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[4] Ky. Rev. Stat. § 26.080; and see § 26.010. Both the Jefferson Circuit Court and the Kentucky Court of Appeals held that further review either by direct appeal or by collateral proceeding was foreclosed to petitioner. *Thompson* v. *Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported; *Taustine* v. *Thompson*, 322 S. W. 2d 100 (Ky. 1959).

[5] Without a stay and bail pending application for review petitioner would have served out his fines in prison in 10 days at the rate of $2 a day. *Taustine* v. *Thompson*, 322 S. W. 2d 100 (Ky. 1959).

[6] *Thompson* v. *Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported.

no original application to that court for such a stay. Explaining its reason, the Court of Appeals took occasion to agree with the Circuit Court that petitioner's "federal constitutional claims are substantial and not frivolous." [8] The Court of Appeals then went on to say that petitioner

> "appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court." [9]

Our examination of the record presented in the petition for certiorari convinced us that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments. 360 U. S. 916. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356 (San Francisco Police Judges Court judgment imposing a $10 fine, upheld by state appellate court, reversed as in contravention of the Fourteenth Amendment).

The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process.[10] The pertinent portion of the city

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[8] *Hugo Taustine et al.* v. *Sam Thompson et al.*, 322 S. W. 2d 100 (Ky. 1959).

[9] *Id.*, at 101.

[10] *Id.*, at 102.

[10] For illustration, the city's brief in this Court states that the questions presented are "(1) Whether the evidence was sufficient to support the convictions, and therefore meets the requirements of the due process clause of the Fourteenth Amendment. . . ."

ordinance under which petitioner was convicted of loitering reads as follows:

> "It shall be unlawful for any person . . . . without visible means of support, or who cannot give a satisfactory account of himself, . . . to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ." § 85-12 Ordinances of the City of Louisville."[11]

In addition to the fact that petitioner proved he had "visible means of support," the prosecutor at trial said "This is a loitering charge here. There is no charge of no visible means of support." Moreover, there is no suggestion that petitioner was sleeping, lying or trespassing in or about this cafe. Accordingly he could only have been convicted for being unable to give a satisfactory account of himself while loitering in the cafe, without the consent of the manager. Under the words of the ordinance itself if the evidence fails to prove all three elements of this loitering charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. The record is entirely lacking in evidence to support any of the charges.

Here, petitioner spent about half an hour on a Saturday evening in January in a public cafe which sold food and beer to the public. When asked to account for his presence there, he said he was waiting for a bus. The city concedes that there is no law making it an offense for a person in such a cafe to "dance," "shuffle" or "pat" his feet in time to music. The undisputed testimony of the manager, who did not know whether petitioner had bought macaroni and beer or not but who did see the patting shuffling or dancing, was that petitioner was welcome

[11] Section 85-13 provides penalties for violation of § 85-12.

there. The manager testified that he did not, at any time during petitioner's stay in the cafe, object to anything petitioner was doing and that he never saw petitioner do anything that would cause any objection. Surely this is implied consent, which the city admitted in oral argument satisfies the ordinance. The arresting officer admitted that there was nothing in any way "vulgar" about what he called petitioner's "ordinary dance," whatever relevance, if any, vulgarity might have to a charge of loitering. There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) without "the consent of the owner or controller" of the cafe.

Petitioner's conviction for disorderly conduct was under § 85-8 of the city ordinance which, without definition, provides that "whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined . . . ." etc. The only evidence of "disorderly conduct" was the single statement of the policeman that after petitioner was arrested and taken out of the cafe he was very argumentative. There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquility of the City of Louisville. The only information the record contains on what the petitioner was "argumentative" about is his statement that he asked the officers "what they arrested me for." We assume, for we are justified in assuming, that merely "arguing" with a policeman is not, because it could not be, "disorderly conduct" as a matter of the substantive law of Kentucky. See *Lanzetta* v. *New Jersey*, 306 U. S. 451. Moreover, Kentucky law itself seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to

complain later that the arrest was unlawful. *Nickell* v. *Commonwealth*, 285 S. W. 2d 495, 496.

Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be sheer denial of due process," [12] so is it a violation of due process to convict and punish a man without evidence of his guilt.[13]

The judgments are reversed and the cause is remanded to the Police Court of the City of Louisville for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[12] *DeJonge* v. *Oregon*, 299 U. S. 353, 362. See also *Cole* v. *Arkansas*, 333 U. S. 196, 201.

[13] See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232. *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103, 106; *Moore* v. *Dempsey*, 261 U. S. 86; *Yick Wo* v. *Hopkins*, 118 U. S. 356. Cf. *Akins* v. *Texas*, 325 U. S. 398, 402; *Tot* v. *United States*, 319 U. S. 463, 473 (concurring opinion); *Mooney* v. *Holohan*, 294 U. S. 103.